(1)

90-1141

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

V.

UNITED STATES DEPARTMENT OF JUSTICE,

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 10, 1991

QUESTION PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in ruling that the Equal Access to Justice Act, which provides for the award of attorney's fees for successful litigants against the United States government in adversary adjudications, is inapplicable to immigration deportation proceedings.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Rafeh-Rafie Ardestani and the Respondent, the United States Department of Justice, Immigration and Naturalization Service.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Rafeh-Rafie Ardestani respectfully prays that a writ of certiorari issue to review the July 6, 1990 judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, and the September 5, 1990 denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing In Banc by the United States Court of Appeals for the Eleventh Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Eleventh Circuit dated July 6, 1990, including the dissenting opinion of Hon. Virgil Pittman, is reported at 904 F.2d 1505 (11th Cir. 1990) and is reprinted in the appendix hereto, p. A1, infra.

The denial of Petitioner's petition for rehearing and suggestion of rehearing en banc dated September 5, 1990 is reported at 915 F.2d 698 (11th Cir.1990) . It is reprinted in the appendix hereto, p. A41, infra.

The opinion and judgment of the Board of Immigration Appeals dated May 12, 1989 has not been reported. It is reprinted in the appendix hereto, p. A43, infra.

The opinion and judgment of the Immigration Court dated January 27, 1989 is not reported. It is reprinted in the appendix hereto, p. A48, infra.

JURISDICTION

Invoking federal statutory law, 5 U.S.C. § 504, the Petitioner filed an Application for Attorney's Fees under the Equal Access to Justice Act with the Immigration Court in Atlanta, Georgia. On January 27, 1989, the Immigration Court awarded Petitioner attorney's fees under the Equal Access to Justice Act. See p. A48, infra.

Upon Respondent's appeal, on May 21, 1989 the Board of Immigration of Appeals entered a judgment and opinion reversing the Immigration Court's order and vacating the award of attorney's fees. See p. A43, infra.

Upon Petitioner's Petition for Review, on July 6, 1990 the Eleventh Circuit Court of Appeals affirmed the decision of the Board of Immigration Appeals. See p. A1, infra. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing En Banc, and on September 5, 1990, the Eleventh Circuit Court of Appeals denied Petitioner's Petition and Suggestion. See p. A41, infra.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C. § 504. Costs and fees of parties

(a)(1) An Agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record,

as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b) (1) For the purposes of this section-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and

reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorney or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,00 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501)(c)(3) exempt form taxation under section 501(a) of such code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a) that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necesary for the Chairman to comply with the requirements of this subsection.

(f) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

On July 9, 1984, Petitioner, then a sixty-two year old woman of the Bahai faith, filed an application for asylum in the United States based upon her well-founded fear of persecution if she were forced to return to her native country of Iran. On November 5, 1984, the United States Department of State Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs determined that Petitioner had shown a "well founded fear of persecution upon return to Iran" in connection with her request for

asylum. Despite this recommendation, Respondent denied Petitioner's asylum application on February 12, 1986, based upon the unwarranted assertion that Petitioner had reached a "safe haven" in Luxembourg and had established residence there.

Counsel for Petitioner advised Respondent in writing that Petitioner had been in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Embassy pending her travel to the United States, and that during her time in Luxembourg, Petitioner stayed in a hotel and at no time applied for residency in Luxembourg. Respondent nevertheless issued an Order to Show Cause against Petitioner on March 31, 1986, charging her with impermissibly remaining in the United States. On April 10, 1986, Counsel for Petitioner sent Respondent another letter reiterating the salient facts, and when Respondent did not timely respond, Petitioner's counsel sent a third letter.

Despite these three letters, notice of hearing in deportation proceedings was sent to Petitioner on May 29, 1986. On June 11, 1986, a deportation proceeding was instituted against Petitioner before the

Immigration Court in Atlanta, Georgia. At that time, Petitioner renewed her request for asylum and introduced numerous exhibits into evidence in support of her case. At that hearing, Petitioner's passport, introduced into evidence, revealed that Petitioner thrice had been examined by Respondent: at her Port of Entry into the United States; at her interview on her asylum application; and prior to the issuance of an Order to Show Cause (when Respondent received a copy of Petitioner's passport which showed that she had been out of Iran for less than one month prior to entry into the United States, and that she had not received a visa or grant of residency from Luxembourg). Respondent presented no contrary evidence whatsoever, and Petitioner was granted asylum by the Immigration Court on October 23, 1986. Respondent did not appeal this decision.

Not only had Respondent invented its assertion, without any evidence whatsoever, that Petitioner established residence in Luxembourg, but it steadfastly persisted in its unwarranted position despite the three letters from Petitioner's counsel. On November 23, 1986, Petitioner filed an Application

for Attorney's fees under the Equal Access to Justice Act. The Application sought relief because the position and argument of Respondent had not been substantially justified, as contemplated by the Equal Access to Justice Act, 5 U.S.C. § 504.

On January 27, 1989, the Immigration Court awarded Petitioner attorney's fees in the sum of $1,071.85 pursuant to the Equal Access to Justice Act. See p. A48, infra. In its Order, the court held:

> [Petitioner] has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled....
>
> To prevail here, the Service must prove that its position was "solid though not necessarily correct in fact and law." McDonald v. Schweiker, 726 F.2d 311, 316 (C.A.7 1983). And, that the Service's position made the issue a close call even though it lost. Ulrich v. Schweiker, 548 F. Supp. 63 (D. Idaho 1982). The Service has provided nothing in support of its position. Moreover, it is highly unlikely that anything it might have provided could have caused it to prevail here.

Respondent appealed the decision of the Immigration Court to the Board of Immigration Appeals ("BIA"). The BIA issued a decision which did not focus upon the central legal issue of the applicability of the Equal Access to Justice Act to deportation proceedings. Instead, the BIA ruled issued a Ruling that regulations issued by the United States Attorney General (under whose authority the Immigration and Naturalization Service and the BIA operate) do not grant authority to an Immigration Judge to consider an Equal Access to Justice Act Application. The BIA noted that its conclusion was contrary to the landmark interpretation of the law, rendered by the United States Court of Appeals for the Ninth Circuit, and stated that the decision was not binding precedent for this case. The BIA vacated the decision of the Immigration Court and denied Petitioner's Equal Access to Justice Act Application. See p. A43, infra.

Petitioner appealed the Board of Immigration Appeals' decision to the United States Court of Appeals for the Eleventh Circuit. In its July 6, 1990 divided decision, the court affirmed the decision of the Board of Immigration Appeals and held that the

Equal Access to Justice Act did not apply to immigration deportation proceedings. In its decision, the majority rejected the holding of Escobar-Ruiz v. INS (supra) and held that the Equal Access to Justice Act's attorney fees provisions do not apply to immigration deportation proceedings. See p. A1, infra. In a strongly articulated dissenting opinion, however, Judge Pittman urged adoption of the holding and rationale of Escobar-Ruiz v. INS (supra), in order not to frustrate Congress' basic purpose in enacting the Equal Access to Justice Act. He concluded that the facts of this case demonstrate the very type of completely unjustified government agency actions that Congress envisioned would be covered by the Equal Access to Justice Act. See p. A1, infra.

Petitioner filed a petition for Rehearing and Suggestion of Rehearing En Banc on this important issue. In its September 6, 1990 decision, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's Petition and Suggestion. See p. A41, infra.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, HOLDING THAT THE EQUAL ACCESS TO JUSTICE ACT DOES NOT APPLY TO IMMIGRATION DEPORTATION PROCEEDINGS UNDER 5 U.S.C. § 504 HAS CREATED A REAL AND INTOLERABLE CONFLICT AMONG THE FEDERAL CIRCUITS ON THIS ISSUE.

By its decision in this case, holding that the Equal Access to Justice Act ("EAJA") is inapplicable to immigration deportation proceedings under 5 U.S.C. § 504, the United States Court of Appeals for the Eleventh Circuit expressly has rejected the statutory interpretation of the Ninth Circuit Court of Appeals's landmark decision Escobar-Ruiz v. I.N.S. 787 F.2d 1294 (9th Cir. 1986) ("Escobar-Ruiz I"), reh'g denied, 813 F.2d 283 (9th Cir. 1987) ("Escobar-Ruiz II"), aff'd 838 F.2d 1020 (9th Cir. 1988) (en banc) ("Escobar-Ruiz III"). In a series of three opinions, the Ninth Circuit Court of Appeals had held that immigration deportation proceedings are "adversary adjudications" as contemplated in 5 U.S.C. § 504 (a)(1), and are the very type of proceedings for which governmental abuse

was to be addressed through EAJA awards of attorney's fees. Id.

Escobar-Ruiz II examined EAJA's statutory language, which in turn required examination of its legislative history and statutory purpose. 813 F.2d at 291. The statutory purpose was gleaned from the Congressional records and the commentary to the Administrative Conference of the United States Model Rules for Agency Implementation of EAJA (which implored that the term "adversary adjudication" be interpreted broadly to serve EAJA's stated goals, rather than hypertechnically to frustrate them). Id. See Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act. Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

The application of EAJA to deportation proceedings is now in a state of chaos. Respondent disapproves of the Escobar-Ruiz decision, and has implemented a policy of non-acquiesence in the Ninth Circuit, where Escobar-Ruiz is controlling law. To date, Respondent has not paid the attorney's fees awarded in Escobar-Ruiz, nor has it paid any other EAJA awards in deportation cases in the Ninth Circuit

or elsewhere. See 67 Interpreter Releases 798 (July 23, 1990). The divided decision of the Eleventh Circuit Court of Appeals in the case at bar aggravates the contention over the legal issue and may be treated as justification for Respondent's "non-acquiescence" in the Ninth Circuit.

The drastically divergent interpretation of the same statute among the Federal Circuits results in the availability of EAJA awards to hold Respondent accountable for, and to deter, unjustifiable and unwarranted litigation in the Ninth Circuit, but not in the Eleventh Circuit. The decision of the court below has created a real and intolerable conflict between the Federal Circuits and only a review by this Court can bring about a uniformity of decisions with respect to this issue.

II.

THE RULING OF THE COURT BELOW IS INCONSISTENT WITH AND FRUSTRATES THE LEGISLATIVE PURPOSE OF THE EAJA STATUTE.

EAJA, enacted as Title II of Public Law 96-481, is derived from Senate Bill 265 (S.265), as amended and recommended for passage by the Committee on the

Judiciary in House Report No. 96-1418 (September 26, 1980). EAJA's express purpose is to reduce the economic deterrents and the disparity in resources and expertise between the United States government and others who would seek review of or who would defend against unjustified governmental action, by entitling certain prevailing parties to recover attorneys fees and other expenses. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. (1980), reprinted in [1980] U.S. Code Cong. and Ad. News, p. 4984.

EAJA represents Congressional recognition that without EAJA's sanctions, a party may have no realistic opportunity to respond in the face of unjustified governmental action, and no effective remedy to secure vindication of his or her rights, causing the individual to endure a governmentally inflicted injustice rather than to contest it. Id. at 4988. See also Spencer v. N.L.R.B. 712 F.2d 539, 549 (D.C. Cir. 1983).

EAJA is premised upon the concept that one who litigates against the government is refining and formulating public policy. H.R. Rep. No. 96-1418 at 4991. EAJA "helps to assure that administrative

decisions reflect informed deliberation," thereby providing a vehicle for "curbing excessive regulation and the unreasonable exercise of Government authority." Id.

In legislative hearings addressing the reauthorization of EAJA in 1985 (H.R. 2378), Congress repeatedly expressed its disapproval of restrictive interpretations of EAJA. See, H.R. No. 99-120 (1985), [1985] U.S. Code Cong. & Ad. News. 132, 137. Congress criticized "overly technical" judicial construction of certain terms (eg. "substantially justified" Id. at 146, and "prevailing party" Id. at 147). The original Act contemplated "an expansive view" Id. at 147, and the adoption of the "broader meaning" of such terminology in order to effectuate its goals. Id. 137

As will be more fully explained by Petitioner if this Court grants certiorari for consideration of the case, the court below erred in its decision by adopting an overly technical judicial construction to the statutory term "adversary adjudication ... under Section 554." This wooden interpretation circumvents EAJA's goals and Congress's intent.

III.

IT IS IN THE PUBLIC INTEREST FOR THIS COURT TO REVIEW THE LOWER COURT'S DECISION WHICH EFFECTIVELY REMOVED GOVERNMENT ACCOUNTABILITY TO THE GROUP OF PEOPLE MOST VULNERABLE TO THE COMPLEXITIES AND HARSH CONSEQUENCES OF EXCESSIVE AND OVERZEALOUS ADVERSARIAL GOVERNMENT ACTIONS.

Aliens in deportation proceedings are perhaps the most vulnerable to the complexities and harsh consequences of excessive and overzealous actions taken by the government in adversary proceedings. The public interest mandates that such people not be forced to choose, presuming they are financially able to do so, between (1) deportation, often with the gravest of all consequences (see: Ng Fung Ho v. White 259 U.S. 276, 284 (1922) (deportation could deprive one of "all that makes life worth living"); moreover, deported aliens may face torture or death upon return to their homelands); or (2) years of costly and complex†

† The provisions of the Immigration and Nationality Act have been recognized as being so complex and so lacking in consistency as to be incomprehensible to the layman and the general practitioner alike. See, Lok v. INS 548 F.2d 27, 28 (2d Cir 1977)

litigation unjustifiably initiated or perpetuated by the government. As deftly articulated by the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild, Amici Curiae in the court below:

> In the absence of any [EAJA] provision to reimburse the successful litigant for the time and expense of representing the public interest in challenging unjustified government action, the dreams of these dislocated, unassimilated, often poor and less educated, but honest human beings, who historically have formed the very foundation of our pluralistic society, may well be frustrated.††

The public interest will be served, and respect for the law will be enhanced, by this Court's protection of the rights of those least able to bear the brunt of excessive and unjustifiable adversary proceedings undertaken by the government itself. The public interest also will be served by holding a federal agency, such as Respondent, accountable for the fair and reasoned exercise of its authority, and by affording people in deportation proceedings due process of law.

†† Brief of Amici Curiae on Behalf of Appellant before the Eleventh Circuit Court of Appeals, p.4

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and this Court should allow Petitioner to file her brief and to articulate more comprehensively why the narrow and hypertechnical interpretation of EAJA made by the court below is erroneous, and why the rationale of the Ninth Circuit Court of Appeals should be adopted and embraced by this Court.

Respectfully submitted,

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ARDESTANI v. U.S. DEPT. OF JUSTICE, I.N.S.

Rafeh-Rafie ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 89-8458.

United States Court of Appeals,
Eleventh Circuit.

July 6, 1990.

Immigration and Naturalization Service appealed from immigration judge's order awarding alien attorney fees under Equal Access to Justice Act after she prevailed in deportation proceeding. The Board of Immigration Appeals ruled that immigration judge was not authorized to award attorney fees, and alien petitioned for review. The Court of Appeals, Fay, Circuit Judge, held that Equal Access to Justice Act did not apply to deportation proceedings.

Affirmed.

Pittman, Senior District Judge, sitting by designation, filed dissenting opinion.

1. **Administrative Law and Procedure**
Key 791

Aliens Key 54.3(4)

Substantial evidence standard applies to review of factual evidence considered by immigration judge and Board of Immigration Appeals in deportation decision.

2. **Administrative Law and Procedure Key 741**

Aliens Key 54.3(2)

Court of Appeals' review of legal decision by immigration judge and Board of Immigration Appeals was plenary.

3. **United States Key 147(11)**

Equal Access to Justice Act's attorney fee provisions did not apply to deportation proceedings. 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)(1)(A); Immigration and Nationality Act, § 292, as amended, 8 U.S.C.A. § 1362.

4. **United States Key 125(5)**

Consent necessary to waive sovereign immunity must be express and not implied.

5. **United States Key 147(5)**

Equal Access to Justice Act waives sovereign immunity in allowing attorney fees against United States and must be construed strictly. 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)1)(A).

6. United States Key 147(5)

Explicit bar on attorney fees against government found in Immigration and Nationality Act is to be regarded as narrow exception to general provisions of Equal Access to Justice Act and thus partial repeal of statutory bar by implication is unwarranted to achieve broad purposes of Equal Access to Justice Act. Immigration and Nationality Act, § 292, as amended, 8 U.S.C.A. § 1362; 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)(1)(A).

Petition for Review of an Order of the Immigration and Naturalization Service.

Before FAY, Circuit Judge, RONEY*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

FAY, Circuit Judge:

This case presents the first impression issue for this circuit of whether or not the Equal Access to Justice Act (EAJA) applies to immigration deportation proceedings. Appellant Rafeh-Rafie Ardestani was awarded attorney fees under EAJA as the prevailing

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, U.S. Senior District Judge for the Southern District of Alabama, sitting by designation.

party in a deportation proceeding by an immigration judge. Appellee the Immigration and Naturalization Service (INS) appealed, arguing that EAJA was inapplicable to deportation proceedings. Upon review, the Board of Immigration Appeals (Board) vacated the decision of the immigration judge and concluded that deportation proceedings are not within the scope of EAJA. Ardestani appeals. Our examination of the relevant statutes has revealed no Congressional intent that EAJA apply to deportation proceedings. Accordingly, we affirm the Board's decision because we find no subject matter jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Ardestani, an Iranian woman, entered the United States as a visitor on December 14, 1982. She remained in this country legitimately pursuant to authorized extensions until May 30, 1984. Fearing persecution upon her return to Iran, Ardestani applied for asylum in the United States on July 9, 1984. The United States Department of State informed INS that Ardestani's concerns was well founded.

On February 15, 1985, INS notified Ardestani of its intention to deny her request for political

asylum, but allowed her the opportunity to submit additional evidence in support of her application. Ardestani claims that she never received this notification. INS denied Ardestani's asylum application on February 2, 1986. This decision was based upon Ardestani's failure to disclose her previous safe haven in Luxembourg, a liberal country in granting residency to political refugees, and her attempt to use the political asylum process in order to disguise her original entry into the United States as an immigrant intending to stay permanently rather than as a refugee seeking asylum. Because her asylum application was denied, INS specified that Ardestani could not remain in the United States beyond February 27, 1986, without its permission. Ardestani's counsel informed INS that her client merely stayed at a hotel in Luxembourg for three days for the purpose of obtaining a visa from the American embassy in order to enter the United States and that she never applied for residency in Luxembourg.

On March 31, 1986, INS issued Ardestani an order to show cause why she should not be deported because she had entered the United States as a nonimmigrant

and had remained longer than the time permitted by INS. Appellant's counsel concedes that notification of deportation proceedings was sent to Ardestani on May 29, 1986. Appellant's Brief at 3. Significantly, that notification contains the following notice:

> NOTE: YOU MAY BE REPRESENTED IN THIS PROCEEDING, AT NO EXPENSE TO THE GOVERNMENT, BY AN ATTORNEY OR OTHER INDIVIDUAL AUTHORIZED AND QUALIFIED TO REPRESENT PERSONS BEFORE AN IMMIGRATION JUDGE. IF YOU WISH TO BE SO REPRESENTED, YOUR ATTORNEY OR REPRESENTATIVE SHOULD APPEAR WITH YOU AT THE HEARING.

R1-120 (emphasis added).

At the deportation hearing conducted on June 11, 1986, Ardestani conceded that she was deportable, but renewed her asylum application. Additionally, the immigration judge received into evidence the show cause order, the State Department letter regarding her asylum request, and a copy of her passport. On October 26, 1986, the immigration judge entered his decision and order, stating that Ardestani had established a well founded fear of persecution under the Immigration and Nationality Act and granting her

asylum for one year. INS did not appeal this decision.

Achieving the relief sought in the deportation proceedings, Ardestani's counsel applied for attorney fees and expenses as the prevailing party under EAJA. The application included letters from the counsel to the INS district director and other documents which were not part of the record at the deportation hearing. INS did not respond to this application.

On January 27, 1989, the immigration judge issued his opinion in Ardestani's deportation proceedings. Recognizing that "EAJA provides for awards for attorney fees in adjudicatory proceedings before administrative agencies" under 5 U.S.C. section 504(a)(1), the immigration judge concluded that Ardestani was the prevailing party and that the opposition of INS was not substantially justified. R1-62. The immigration judge awarded attorney fees in the amount of $1,071.85.

On February 9, 1989, INS apealed this award of attorney fees to the Board of Immigration Appeals. INS contended that EAJA was inaplicable to deportation proceedings; therefore, the immigration judge was not

authorized to award attorney fees. Alternatively, INS argued that its position was substantially justified because, as Ardestani conceded, deportation was warranted under the immigration statute. Ardestani responded that attorney fees were available under EAJA for a deportation proceeding and that the position of INS was not substantially justified.

On May 12, 1989, the Board vacated the award of attorney fees and costs by the immigration judge and denied the application. Disagreeing that deportation proceedings are encompassed by EAJA, the Board reasoned that the binding regulations of the United States Attorney General in 28 C.F.R. section 24.103, providing that deportation proceedings are not within the scope of EAJA, presented "a more fundamental reason" to vacate the decision of the immigration judge. R1-2. The Board, therefore, determined that the immigration judge had no authority to award attorney fees and costs under EAJA. Pursuant to 5 U.S.C. section 504(c)(2), Ardestani appealed to this court.

II. EXPLICATION

A. Standards of Review

[1,2] When a decision by the Board of Immigration Appeals is supported by substantial evidence, "Congress has mandated that we defer to the Board and affirm." Blackwood v. INS, 803 F.2d 1165, 1168 (11th Cir. 1986) (per curiam); 8 U.S.C. § 1105a(a); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); Arauz v. Rivkind, 845 F.2d 271, 275 (11th Cir. 1988); Chavarria v. United States Dep't of Justice, 722 F.2d 666, 670 (11th Cir. 1984). As Arauz, Blackwood and Chavarria demonstrate, however, the substantial evidence standard applies to review of the factual evidence considered by the immigration judge and Board in a deportation decision and not a purely legal issue as we have in this case. Because there are no contested factual issues in this case and we decide solely a question of law, our review is plenary. Hamer v. City of Atlanta, 872 F.2d 1521, 1526 (11th Cir. 1989); Bailey v. Carnival Cruise Lines, Inc., 774 F.2d 1577, 1578 (11th Cir. 1985).

B. Statutory Analysis

[3] To determine the applicability of EAJA to deportation proceedings, we must examine the interaction of the relevant statutes and regulations in order to maintain the integrity of Congressional intent. We are guided in this inquiry by principles of statutory interpretation established by the Supreme Court. "The starting point in statutory interpretation is 'the language [of the statute] itself.'" United States v. James, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring)); Newman v. Soballe, 871 F.2d 969, 971 (11th Cir. 1989). Reviewing courts assume "'that the legislative purpose is expressed by the ordinary meaning of the words used'" in the statute. American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982)(quoting Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)) Director, Office of Workers' Compensation Programs v. Drummond Coal Co., 831 F2d 240, 245 (11th Cir. 1987); see INS v. Cardoza-Fonseca,

480 U.S. 421, 431, 107 S.Ct. 1207, 1213, 94 L.Ed.2d 434 (1987). The "strong presumption" that the plain language of the statute expresses Congressional intent is rebutted only in "°rare and exceptional circumstances,'" when contrary legislative intent is expressed clearly. Cardoza-Fonseca, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 (citations omitted); Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108, 100, S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); United States v. Hurtado, 779 F.2d 1467, 1476-77 (11th Cir. 1985); National Wildlife Fed'n v. Marsh, 721 F.2d 767, 773-74 (11th Cir. 1983).

[4.5] We also must consider the important principle of statutory construction concerning the waiver of sovereign immunity by the United States. The Supreme Court has held that "[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign." Library of Congress v. Shaw, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86, 103

S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983); McMahon v. United States, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951); Loftin v. Rush, 767 F.2d 800, 808, (11th Cir. 1985). The necessary consent to waive this traditional immunity must be express and not implied. Library of Congress, 478 U.S. at 318, 106 S.Ct. at 2963; United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577(1947). A count may not "grant attorneys' fees and costs against the United States in the absence of a congressional or constitutional waiver of sovereign immunity which grants it the authority to do so." Ewing & Thomas, P.A. v. Heye, 803 F.2d 613, 616 (11th Cir.1986). Since EAJA waives sovereign immunity in allowing attorney fees against the United States, it must be construed strictly. Haitian Refugee Center v. Meese, 791 F.2d 1489, 1494 (11th Cir.), vacated in part on other grounds, 804 F.2d 1573 (11th Cir.1986); see In re Perry, 882 F.2d 534, 538 (1st Cir. 1989); Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir.1988); Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 225 (D.C.Cir.1984); Fidelity Constr. Co. v. United States, 700 F.2d 1379, 1385 (Fed. Cir.)

cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 103 (1983).

EAJA contains the following two similar provisions for attorney fees and costs:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort),

> including proceedings for judicial review of agency action ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Both of these sections direct the court to award fees and expenses to a prevailing party in an adversary adjudication by administrative agencies as authorized by section 504(b)(1)(C). 5 U.S.C. § 504(b)(1)(C); 28 U.S.C. § 2412(d)(3). An "adversary adjudication" is defined as "an adjudication under section 554" of the Administrative Procedure Act (APA) in which the position of the United States is represented by counsel. 5 U.S.C. § 504(b)(1)(C).

While there has been no dispute in this case that a deportation proceeding is an adjudication where the position of the United States is represented by counsel, INS contends that a deportation proceeding is an adversary adjudication under the Immigration and

Nationality Act (the Act)[1] and not under the APA. Two circuit courts have polarized the analysis of the phrase "an adjudication under section 554" of section 504(b)(1)(C) in order to determine the relationship of section 554 of the APA to an EAJA adversary adjudication. Owens v. Brock, 860 F.2d 1363 (6th Cir.1988); Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir.1988) (en banc). Ardestani contends that Escobar Ruiz controls this case, while INS argues that Owens should dictate our result.

Since appellant has argued that EAJA creates a definitional bridge by using the APA to place deportation proceedings within EAJA for the purpose of awarding attorney fees, we also must examine this language. Both the Sixth and Ninth Circuits examined the explanatory statement of the EAJA conference committee, which delineated that the statute "defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where

1. The Act provides that mandatory deportation proceedings require that a "[d]etermination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present." 8 U.S.C. § 1252(b).

the agency takes a position through representation by counsel or otherwise. H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980), reprinted in 1980 U.S. Code Cong. & Admin.News 4953, 5003, 5012; Owens, 860 F.2d at 1365; Escobar Ruiz, 838 F.2d at 1023. The Ninth Circuit interpreted this statement to mean that the determination of an adversary adjudication requires "look[ing] at the procedures by which deportation hearings are actually conducted, rather than determining whether such hearings are technically governed by the APA." Escobar Ruiz, 838 F.2d at 1023. After determining that the procedures of the Act and the APA are "fundamentally identical," the Ninth Circuit concluded that a deportation proceeding conforms to APA requirements and "constitutes an adversary adjudication as defined under the APA." Id. at 1025.

The Sixth Circuit interpreted the same conference committee statement contrariwise: "[T]he use of a concrete term such as °defined' leads us to believe it probable that Congress intended precisely the opposite interpretation of section 504(b)(1)(C) from the one taken by the Ninth Circuit." Owens, 869 F.2d at 1366. The Sixth Circuit bolstered its conclusion by commen-

tary from the model rules for agency implementation of EAJA issued by the Administrative Conference of the United States (ACUS), wherein ACUS expressed concern that a liberal interpretation might provide for broader applicability than Congress intended. 46 Fed.Reg. 32,901(1981); Owens, 860 F.2d at 1366. As a result of this concern, ACUS eliminated EAJA coverage for agency proceedings voluntarily using section 554 procedures and commented that "[t]here remains, however, the difficult question of what proceedings are °under section 554.' Where it is clear that certain categories of proceedings are governed by this section, agencies should list the types of proceedings in their rules." 46 Fed.Reg. at 32,901; Owens, 860 F.2d at 1366. Juxtaposing the legislative history with the construction principle that waiver of immunity is to be narrowly construed, the Sixth Circuit concluded that the Ninth Circuit opinion "cannot withstand scrutiny" and is merely an advisory opinion since the original panel's determination that the plaintiff in Escobar Ruiz was not a prevailing party was unaffected by the en banc question of the application of EAJA to awards for attorney fees. Owens, 860 F.2d at 1366 & n.2.

Recently scrutinizing the reference in EAJA to "under section 554" of the APA, the District of Columbia Circuit also rejected the Ninth Circuit's interpretation. St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 449-51 (D.C. Cir.1989). Finding that Department of Energy proceedings are outside the "adversary adjudication" coverage of EAJA, the District of Columbia Circuit concluded that "under" in section 504(b)(1)(C) had the meaning of "subject [or pursuant] to" or "by reason of the authority of" because of the meaning of the word 'under' in other sections of EAJA. Id. at 450. That court stated: "We are unwilling so [as the Ninth Circuit] to stretch the word "under" because the usage of the word in EAJA itself tugs against such creative reading, and because we are bound to honor the canon that waivers of the sovereign's immunity must be strictly construed." Id. at 449-50; see 5 U.S.C. §§ 504(a)(2), (c)(2), (d). The court also found no definitional distinction in the House and Senate bills. St. Louis Fuel & Supply Co., 890 F.2d at 450-51. We are persuaded by the reasoning of the Sixth and District of Columbia Circuits as well as by a recent Third Circuit decision

in accord with our rationale herein that there is no "°clearly expressed legislative intention'" contrary to the statutory language "which would require us to question the strong presumption that Congress expresses its intent" that "under" in section 554 means "governed by" or "subject to" section 554. Cardoza-Fonseca, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 (citations omitted); Clarke v. INS, F.2d, Nos. 89-3477 & 90-3125 (3d Cir. May 24, 1990).

Furthermore, the Supreme Court has held that the hearing requirements of the APA do not govern deportation proceedings, which are controlled under section 242 of the Act, 8 U.S.C. section 1252. Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955). Discussing the history of the immigration laws, the Court conceded that, before amendment of the immigration laws in 1951, it had held that the APA applied to deportation proceedings in Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), modified on other grounds, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). Marcello, 349 U.S. at 306, 75 S.Ct. at 759. In Marcello, the Court had to determine whether or not an additional amendment to

the immigration laws in 1952 has restored the law to its former position, where the hearing provisions of the APA would govern deportation proceedings. While the Court concluded that the provisions for hearings under the APA and the Act were identical in many respects, it attributed these similarities to the fact that the APA was a model for the Act. Marcello, 349 U.S. at 307-08, 75 S.Ct. at 759-60. The Court determined that section 242 of the Act is a deliberate effort by Congress to create a separate procedure tailored to deportation proceedings:

> From the Immigration Act's detailed coverage of the same subject matter dealt with in the hearing provisions of the Administrative Procedure Act, it is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the particular needs of the deportation process. The same legislators ... sponsored both the Administrative Procedure Act and the Immigration Act, and the framework of the latter indicates clearly that the Administrative Procedure Act was being used as a

model. But it was intended only as a model, and when in this very particularized adaptation there was a departure from the Administrative Procedure Act - based on novel features in the deportation process- surely it was the intention of the Congress to have this deviation apply and not the general model.

[W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Marcello, 349 U.S. at 308-09, 310, 75 S.Ct. at 760-61, 762.

Marcello has not been legislatively or judicially overruled. See Ho Chong Tsao v. INS, 538 F.2d 667, 669 (5th Cir.1976)(per curiam), cert. denied, 430 U.S. 906, 97 S.Ct. 1176, 51 L.Ed. 582(1977); Giambanco v. INS, 531 F.2d 141, 144 (3d Cir.), cert. denied, 429 U.S. 853, 97 S.Ct. 145, 50 L.Ed.2d 127 (1976) (These cases recognize the inapplicability of section 554 to deportation proceedings under the procedures of the

Act.). In Ho Chong Tsao, the former Fifth Circuit followed the Third Circuit's reliance on Marcello in holding that "the APA has no relevance" to the Board's review of an immigration judge's refusal to revoke the alien petitioner's deportation order. Ho Chong Tsao, 538 F.2d at 669; see Giambanco, 531 F.2d at 145. Since EAJA defines an "adversary adjudication" as an adjudication under section 554" of the APA, Marcello remains authoritative in its determination that deportation proceedings under section 242 of the Act are not adjudications under section 554 of the APA.

Additional persuasive support that deportation proceedings are not under EAJA is found in the implementing regulation for EAJA by the Attorney General. 28 C.F.R. 24.103(1982); see 8 U.S.C. § 1103(a). This regulation lists the proceedings covered by EAJA, with "proceeding" defined as an "adversary adjudication: under section 554 of the APA. 28 C.F.R. 24.102(b), (e) & 24.103. Deportation proceedings have not been added in the most recent promulgation of this list, which includes Drug Enforcement Administration hearings, handicap discrimination hearings and civil rights hearings. 28 C.F.R. 24.103 (1989). This

regulation also states that "[i]f a proceeding includes both matters covered by the Act [EAJA] and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues." 28 C.F.R. 24.103(b). Deportation proceedings are omitted from the specific list of included adversary adjudication proceedings covered by EAJA. See Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) ("°[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam))).

Furthermore, supplemental information published with the preceding interim rule before codification of this regulation reveals that deportation proceedings intentionally were excluded pursuant to Marcello. 46 Fed.Reg. 48,922 (1981). Presumably, Congress was aware of this administrative interpretation when it reenacted and amended 5 U.S.C. section 504 in 1985, without including deportation proceedings. The indi-

cation is that the interpretation by the Attorney General influenced Congressional action. See Cannon v. University of Chicago, 441 U.S. 677, 698-99, 99 S.Ct. 1946, 1958-59, 60 L.Ed.2d 560 (1979); Lorillard v. Pons, 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978).

Congress has changed or clarified the coverage of EAJA since its initial enactment in 1980 in response to judicial and legislative interpretations. In 1985, for example, it expanded the definition of "adversary adjudication" to include any appeal of a decision made under section 6 of the Contract Disputes Act of 1978 to overrule the Federal Circuit's Fidelity Constr. Co. holding that EAJA was inapplicable to these decisions. 5 U.S.C. § 504(b)(1)(C)(ii); H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 15 (1985), reprinted in 1985 U.S.Code Cong. & Admin.News 132, 144; see also 5 U.S.C. § 504(b)(1)(C)(iii)(In 1986, Congress amended EAJA to include hearings conducted under chapter 38 of title 31, Administrative Remedies and False Claims and Statements.). Additionally, the legislative history of the 1985 EAJA, Extension and Amendments, clarified coverage for Social Security Administration hearings

at the administration level without amending EAJA. The House Report strongly implied that such hearings are "adjudications" under section 554 of the APA so that they become "adversary adjudications" under EAJA when the position of the United States is represented by counsel. H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 10 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132, 138-39.

Title 5 U.S.C. section 504(c)(1) provides that "[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses." Following review of the relevant regulations, ACUS did not criticize the Attorney General's interpretation regarding the inapplicability of EAJA to deportation proceedings. See 47 Fed.Reg. 15,774-76 (1982). Although Congress was silent as to the applicability of EAJA to deportation proceedings, the Attorney General's relevant regulation enacted after consultation with ACUS is a reasonable construction of EAJA. "[I]f the statute is silent or ambiguous with respect to the specific

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); De Cuellar v. Brady, 881 F.2d 1561, 1565 (11th Cir.1989); Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir.1988). The Attorney General permissibly interpreted the EAJA phrase "under section 554" by concluding in 28 C.F.R. section 24.103 that deportation proceedings are not covered by the APA and, therefore, are not within the scope of EAJA.

Having determined that deportation proceedings are not included under EAJA for the purpose of awarding attorney fees to the prevailing party, we must consult the Act for guidance on this question, as instructed by Marcello. EAJA also directs us to the Act by the admonition that "[e]xcept as otherwise specifically provided by statute," it should be followed. 28 U.S.C. § 2412(d)(1)(A). Section 292 of the Act states that "[i]n any exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the

Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362 (emphasis added). In addition to this provision clearly barring attorney fees awarded against the government, Ardestani was informed specifically in her notification of her deportation hearing before the immigration judge that she would not be entitled to attorney fees in language which mirrors the statute.

Even if we had not decided that EAJA does not control the award of attorney fees in deportation proceedings, the Supreme Court has established principles of construction for harmonizing two statutes. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974); Smith v. Christian, 763 F.2d 1322, 1325 (11th Cir.1985) (per curiam); see also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976) ("it is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a

later enacted statute covering a more generalized spectrum."). The Court also has held that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton, 417 U.S. at 550, 94 S.Ct. at 2482; Estate of Flanigan v. Commissioner, 743 F.2d 1526, 1532 (11th Cir.1984).

Section 292 of the Act expressly states that individuals involved in deportation proceedings shall have the privilege of representation by counsel of choice "at no expense to the government." 8 U.S.C. § 1362. While EAJA removes common law and sovereign immunity barriers to awarding attorney fees against the government in appropriate cases, there is no indication that it was intended to abrogate particular statutory provisions specifically barring fee shifting. See e.g., H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 8-9 (1980), reprinted in 1980 U.S. Code Cong. & Admin.News 4984, 4986-88. This court has stated that there are three predicate findings to an award of fees and expenses under EAJA: "(1) the litigant opposing the United States must be a °prevailing

party'; (2) the government's position must not have been substantially justified; and (3) there must be no circumstances that make an award against the government unjust." Jean v. Nelson, 863 F.2d 759, 765 (11th Cir.1988), cert.granted, ___ U.S. ___, 110 S.Ct. 862, 107 L.Ed.2d 947 (1990). We conclude that the first two prerequisites concern the facts of the individual case and that they are not issues in this case because we are reviewing the legal issue of the availability of attorney fees when the alien is successful against the government at a deportation proceeding. We find that the third requirement for awarding attorney fees under EAJA is controlling because section 1362 explicitly precludes attorney fee awards in deportation proceedings. It would be unjust to allow such an award against the government since Congress specifically has determined that fees against the government are not available in this context.

The general language of EAJA is insufficient to overcome the absolute words of the Act. The primary purpose of EAJA is "to increase the accessibility to justice-in administrative proceedings and civil actions." H.R.Rep. No. 120, 99th Cong. 1st Sess., pt.

1, at 8 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132, 136. In rejecting the Second Circuit's reliance on the "broad purposes" of a later-enacted statute to establish partial repeal by implication, the Supreme Court held that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the [later-enacted] statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 1393-94, 94 L.Ed.2d 533 (1987) (per curiam) (emphasis in original); see Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir.1988) ("[A]mendments by implication are disfavored. Only when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one."), cert. denied, ___ U.S. ___, 109 S.Ct. 1120, 103 L.Ed.2d 182 (1989). Relying on and reinforcing the policy in section 1362 against shifting to the government the expense of aliens' legal representation in deportation proceedings, this court held that excludable aliens are not entitled to representation in deportation proceedings, this court held that excludable aliens

are not entitled to representation at government expense in habeas corpus proceedings challenging denial of parole. Perez-Perez v. Hanberry, 781 F.2d 1477, 1480-81 (11th Cir.1986). Cases from this circuit in which attorney fees have been allowed under EAJA in immigration proceedings are distinguishable because they have not involved the specific facts of a deportation proceeding regarding a single alien. See, e.g., Jean v. Nelson, 863 F.2d 759 (This complex Haitian refugee litigation concerned basic constitutional issues regarding mass exclusion hearings, conducted without counsel, and detention of class members pending determination of their political asylum applications.); Haitian Refugee Center, 791 F.2d 1489 (Haitian class successfully challenged on due process and equal protection grounds INS accelerated processing of applications for asylum as unreasonable.). These cases involve attacks upon the INS program and not proceedings under the Act.

[6] If we were to allow attorney fee awards against the government in deportation proceedings, then we effectively would sanction a partial repeal of section 1362 by implication. Such a holding would

disregard sovereign immunity principles as well as authority advising against repeals by implication. Moreover, the different purposes of the Act and EAJA do not conflict. There has been no convincing showing in this case that Congress intended to repeal the bar of fee shifting in the Act or that EAJA and the Act are irreconcilable. See Radzanower, 426 U.S. at 154, 96 S.Ct. at 1992; United States v. Devall, 704 F.2d 1513, 1518 (11th Cir.1983). We find no "positive repugnancy" between EAJA and the Act regarding awarding attorney fees against the government so that "they cannot mutually coexist." Radzanower, 426 U.S. at 155, 96 S.Ct. at 1993. We, therefore, hold that the explicit bar on attorney fees against the government found in the Act is to be regarded as a narrow exception to the general provisions of EAJA and that partial repeal of section 1362 by implication is unwarranted to achieve the broad purposes of EAJA.

This holding also eliminates subject matter jurisdiction. Where express statutory preclusion occurs, another statute may not be used to circumvent that exception and, in this case, subject matter juridiction is lost. See Rhodes v. United States, 760

F.2d 1180, 1183 (11th Cir.1985)(In concluding that subject matter jurisdiction did not exist, this court found that the APA "excludes cases where liability is precluded expressly or by implication, so it says nothing to bypass express or implied preclusion in other law, and confers no jurisdiction to do so." (citing Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977))); see also Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454, 1456-57 (11th Cir.1987)(per curiam)(In a statutory, definitional interpretation, this court found that nonsignatory subcontractors and sureties were not "employers" under ERISA, thereby precluding federal subject matter jurisdiction over claims against nonsignatories for signatory's failure to make contributions to employee benefit plans.). "[L]ack of subject matter jurisdiction ... requires dismissal on the court's own motion if not raised by the parties." Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257, 1258 (11th Cir. 1988); see Fed.R.Civ.P. 12(h)(3).

We reiterate that we are not reviewing this case factually, but legally. We also stress the narrowness

of our holding. Ardestani obtained the asylum relief that she sought. We simply find no statutory basis for her requested award of attorney fees against the government under EAJA, as discussed herein. Accordingly, we conclude that subject matter jurisdiction is lacking and that the Board of Immigration Appeals correctly found that the immigration judge had no statutory authority to award attorney fees to Ardestani. We AFFIRM.

PITTMAN, Senior District Judge, dissenting:

I dissent from the majority's holding and would adopt the holding and rationale of Escobar Ruiz v. I.N.S., 838 F.2d 1020 (9th Cir.1988) (en banc), aff'g, 813 F.2d 283 (9th Cir.1987). In my opinion, the majority's decision overlooks Congress' basic purpose in enacting the Equal Access to Justice Act (EAJA). EAJA provides for the payment of attorney fees arising out of an adversary adjudication before a government agency unless the government's position was substantially justified. See 5 U.S.C. § 504(a)(1).

In 1980, Congress enacted EAJA and, in 1985, reaffirmed and made permanent the provisions of the Act. The legislative history of the Act demonstrates

that the basic purpose of the Act was "to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, against the United States, unless the Government action was substantially justified." H.R.Rep. No. 1418, 96th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132-33. This language evidences Congress' intent that a private party who prevails against unwarranted government action such as that exhibited in this case would be allowed to recover the funds expended to vindicate her rights. The facts of this case demonstrate the type of totally unjustified actions on the part of a government agency that Congress envisioned would be covered by EAJA. The Appellee, INS, denied the Appellant's request for political asylum and began deportation proceedings against the Appellant even though the INS knew that the State Department had termined that the Appellant had a well founded fear of persecution. This circuit in Jean v. Nelson, 863 F.2d 759 (11th Cir.1988), awarded attorney fees following challenged INS hearings under the EAJA. The three predicate findings necessary to award fees and expen-

ses under the EAJA set out in that case have been met in this case.

Section 504(a)(1) applies to "adversary adjudications" before a government agency. The statute defines an "adversary adjudication" as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license,..." 5 U.S.C. § 504(b)(1)(C). The legislative history of this section indicates that Congress intended an "adversary adjudication" to be defined as "an agency adjudication defined under the Administrative Procedures Act [section 554] where the agency takes a position through representation by counsel or otherwise." H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess.23(1980), reprinted in 1980 U.S.Code Cong. & Admin.News 5003, 5012.[1] An adversary adjudication

1. The majority's decision relies upon St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 449-51 (D.C.Cir.1989). In St. Louis Fuel & Supply Co., the court examined the language of section 504(b)(1)(C) and determined that the above quoted legislative history did not support the proposition that adversary

"defined under" section 554 is an adjudication "required by statute to be determined on the record after opportunity for an agency hearing, ..." 5 U.S.C. § 554(a). See Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir.1984); Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir.1984). The deportation proceedings instituted by the Appellee were required by statute and "made only upon a record in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, ..." 8 U.S.C. § 1252(b). The deportation proceedings fall squarely within the definition of an "adversary adjudication" defined under section 554 and are therefore covered by EAJA.

This construction of EAJA is consistent with the recommendations of the Administrative Conference of the United States (ACUS). In drafting model rules to

adjudications not governed by the APA were subject to the provisions of EAJA. St. Louis Fuel & Supply Co., 890 F.2d at 450. The court's rationale was that the version of the Act passed by the Senate contained the language "subject to" instead of "under" and that the House Judiciary Committee's Report indicated that "under" meant "subject to." Id. This conclusion ignores the plain language "defined under the Administrative Procedure Act" contained in the legislative history of section 504(b)(1)(C).

be used by administrative agencies in implementing EAJA, ACUS stated that "considering the purposes of the Equal Access to Justice Act, questions of its coverage should turn on substance-the fact that a party has endured the burden and expense of a formal hearing-rather than technicalities." 46 Fed. Reg.32,901 (1981). The position taken by the majority contradicts this language because the decision focuses on the technicality of "under section 554" instead of examining the substance of the deportation proceedings which clearly fall within the definition of an "adversary adjudication" contained within section 554.

The majority's opinion relies heavily on Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955). I disagree with the majority's application of Marcello to this case. Marcello states, "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed..." and then restricted its decision and departure to the procedure for deportation hearings. Marcello, 349 U.S. at 310. 75 S.Ct. at 726 (emphasis added). The court then stated, "the present statute expressly supercedes the hearing provisions of that Act." Id. (emphasis added). Never-

theless, the deportation proceedings are agency adjudications of the type defined under section 554. Therefore, the Supreme Court's decision in Marcello is not inconsistent with the Ninth Circuit's decision in Escobar Ruiz. Escobar addressed Marcello's treatment of the issue of whether deportation proceedings were subject to the hearing provisions of the APA.

Finally, the recovery of attorney fees pursuant to EAJA is not in conflict with nor precluded by section 292 of the Immigration and Nationality Act.[2] Section 292 is designed to prevent the appointment of counsel for indigent aliens in the process of exclusion or deportation proceedings. See generally, Perez-Perez v. Hanberry, 781 F.2d 1477 (11th Cir. 1986). This provision does not conflict with EAJA which only allows recovery by a prevailing party when the government's actions are without substantial justification. The legislative history of section 292

2. Section 292 provides that:
[i]n any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings. 8 U.S.C. § 1362

does not clearly demonstrate that the section was intended as a complete and total bar to the collection of fees in deportation proceedings. See H.R. Rep. No. 1365, 82nd Cong. 2d Sess. (1952), reprinted in 1952 U.S.Code Cong. & Admin.News 1653, 1712.

Where the legislative history is such, as here, that it can be persuasively construed to support two conflicting views between persons of good faith, it appears to me that the court should look to the broad purposes and intent of the statute to grant attorney fees and expenses rather than strangle the law's purpose by a hypercritical interpretation and application of the law.

For these reason, I dissent from the majority's holding.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8458

RAFEH RAFIE ARDESTANI, Petitioner,

versus

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 6, 1990, 11th Cir., 198__, F.2d___).
(September 5, 1990)

Before: FAY, Circuit Judge, RONEY*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.
** Honorable Virgil Pittman, U.S. Senior District Judge for the Southern District of Alabama, sitting by designation.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A26 591 156 - Atlanta Date: May 12 1989

In re: RAFEH RAFIE ARDESTANI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolyn F. Soloway, Esquire
David N. Soloway, Esquire
Duncan Square, Suite 203-A
1961 North Druid Hills Road
Atlanta, Georgia 30360

ON BEHALF OF SERVICE: Terry C. Bird
District Counsel

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated January 27, 1989, the immigration judge ordered that the application for fees and costs be granted in the amount of $1,071.85. The Immigration and Naturalization Service appeals from this decision.

For the reasons set forth below, the decision of the immigration judge granting the application for fees and costs is vacated and the application for such fees and costs is denied. The request for oral argument is denied.

In his January 27, 1989, decision, the immigration judge initially concluded that deportation proceedings are within the scope of the EAJA. While we do not agree with the immigration judge's conclusion in this regard, there is a more fundamental reason we find that the immigration judge's decision must be vacated. See Matter of Anselmo, Interim Decision 3105 (BIA 1989).

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General. 1/ See section 103 of the Immigration and Nationality Act

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1/ Even the specific grants of statutory authority to immigration judges in the Act (i.e., to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations

(continued on next page)

(the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. See sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; Matter of Medina, Interim Decision 3078 (BIA 1988); Matter of Valdovino, 18 I&N Dec. 343 (BIA 1982); Matter of Bilbao-Bastida, 11 I&N Dec. 615 (BIA 1966), aff'd Bilbao Bastida v. INS, 409 F.2d 820 (9th Cir. 1969), cert. dismissed, 396 U.S.

1/ (Continued)

"as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

802 (1969); Matter of Tzimas, 10I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. See 28 C.F.R. § 24.103. See also 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981)(interim rule with request for public comment). 2/ Neither this Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. The United States Court of Appeals for the Ninth Circuit has held en banc that

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2/ The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. None of the three comments received, including the "extensive comments" from the Administrative Conference of the United States, addressed the specific statement that the EAJA did not apply to deportation and exclusion hearings or commented on the express language of 28 C.F.R. § 24.103 ("adversary adjudications required by statute to be conducted by the Department under 5 U.S.C. 554"). See 47 Fed. Reg. 15774 (1982)("Supplementary Information").

the EAJA does apply to deportation hearings before the immigration judges and the Board. Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988). But cf. Owens v. Brock, 860 F.2d 1363 (6th Cir. 1988). However, authority from one circuit is not binding in another. Georgia Dep't of Med. Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988); Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985).

Accordingly, in view of the controlling Departamental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Therefore, the January 27, 1989, decision of the immigration judge will be vacated and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The January 27, 1989, decision of the immigration judge granting respondent's application for attorney fees and costs in the amount of $1,071.85 is vacated and the application for fees and costs under the EAJA is denied.

/s/ David L. Milhollan
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE IMMIGRATION JUDGE

ATLANTA, GEORGIA

In the Matter of	)	
	)	
Rafeh Rafie Ardestani	)	
	)	IN DEPORTATION PROCEEDINGS
A26 591 156	)	
	)	
Respondent	)	

The respondent is a native and citizen of Iran who last entered the United States at Chicago on December 14, 1982 as a visitor and was authorized to remain until May 30, 1984. At her hearing on October 23, 1986, she admitted to the allegations and was found deportable under section 241(a)(2) of the Act.

As relief from deportation, she requested asylum, or in the alternative, withholding of deportation. The basis for her fear of return to Iran was that she was a member of the Bahai faith. Entered into evidence was an opinion letter from the Department of State wherein it opined that she had a well-founded fear of persecution in Iran. This letter had been sent to the district director and he denied her application on February 12, 1986. The denial letter indicates that she had found refuge in Luxembourg

because she had been granted residence there. In a letter to the district director on February 17, 1986, counsel for the respondent set out facts which established that she has not 'resided' in Luxembourg. Instead of reconsidering the decision, the district director issued an Order to Show Cause on March 31, 1986. At her hearing, she presented these same facts and was granted asylum. The Service did not appeal.

The respondent has filed a request for attorney fees under the Equal Access to Justice Act (EAJA). She seeks this award arguing that she was the prevailing party and that the Service's litigation position was not substantially justified.

The EAJA provides for awards for attorney fees in adjudicatory proceedings before administrative agencies. The statute provides [5 U.S.C. section 504(a)(1) (1982 and Supp. III 1985)]:

> An agency that conducts an adversary adjudication shall award to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or the special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made

in the adversary adjudication for which fees and other expenses are sought. 1/

The purpose of the EAJA is to insure that covered individuals and entities "will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. "2/ The court in Escobar Ruiz v. INS, 838 F.2d 1020 (C.A. 9 1988), held that immigration hearings are adversarial adjudications and covered by the EAJA.

If the respondent is the prevailing party, it must be determined whether the Service's litigating position was substantially justified. In Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982), the court held that "substantial justification" is an "acceptable middle ground" between automatic awards and awards made only where government action was "arbitrary, frivolous, unreasonable, or groundless, or

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1/ Added October 21, 1980, Public Law 96-481, Title 11, section 203(a)(1); as amended, Public Law 99-80, section 1 August 5, 1985.

2/ House Rept. No. 99-120, Part 1, 99th Cong. 1st Sess. [Pub. L. 99-80] pp. 4, 13, & 18 (1985).

the United States continued to litigate after it became so." Id at 817. Moreover, the mere absence of bad faith or absence of deliberate abuse of legal process is not enough to avoid an award of fees and expenses.

In Gavette v. OPM, 785 F.2d 1568 (Fed. Cir. 1986), the court held the government in showing its position was substantially justified must show that "it was clearly reasonable" in asserting its position. Id at 1579 (Emphasis in original). Further, the government must show that it has not "pressed a tenuous factual or legal position, albeit one not wholly with foundation."3/ It is not sufficient for the government to show merely "the existence of a colorable legal basis" for its case. The EAJA's legislative history states that the mere fact that the government's position was reasonable does not mean it

3/ The EAJA's legislative history indicates it is "intended to caution agencies to carefully evaluate their case and not pursue those which are weak or tenuous." House Rept. No. 96-1418, 2nd Sess. p. 54 (1980).

Sess. p. 9 (1985).

was substantially justified.4/

The EAJA provides that agencies are to establish uniform procedures for the submission and consideration of applications for attorney fees and costs. The Department of Justice has established these procedures 2at 28 C.F.R. Part 24. In issuing these regulations it stated that deportation and exclusion proceedings were not covered by the EAJA, 46 Fed. Reg. 48,922 (Oct. 5, 1981). However, this assertion has been rejected by the court in Escobar Ruiz, supra.

Applications must be filed no later than thirty days after final disposition of the proceedings. 28 C.F.R. section 24.204. This application was filed on November 20, 1986, within the required period and is timely filed.

Under the EAJA the burden is on the Service to show that its position was substantially justified and why an award should not be made. Charter Management, Inc. v. NLRB, 768 F.2d 1299 (C.A. 11 1985); and see, 47 Fed. Reg. 15,775.

4/ House Rept. No. 99-120, Part 1, 99th Cong. 1st Sess. p. 9 (1985).

The respondent has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled.

To prevail here, the Service must prove that its position was "solid though not necessarily correct in fact and law." McDonald v. Schweiker, 726 F.2d 311, 316 (C.A.7 1983). And, that the Service's position made the issue a close call even though it lost. Ulrich v. Schweiker, 548 F. Supp. 63 (D. Idaho 1982). The Service has provided nothing in support of its position. Moreover, it is highly unlikely that

anything it might have provided could have caused it to prevail here.

Counsel for the respondent has filed a detailed request for fees based upon fourteen hours of work. I note that the fractional hours provided for each task do not total fourteen. But, fractional hours are not provided for work done after October 23, 1986. The additional 2.1 hours apparently is for time spent on the EAJA request and this is allowed. See, Haitian-Refugee Center v. Meese, 791 F.2d 1489 (C.A. 11 1986). Time spent on work from October 14, 1985 until February 17, 1986 must be denied as it predates the issuance of the Order to Show Cause. The request for fees at the rate of $90 per hour is reasonable when adjustment for the cost of living is made. Also, costs will be allowed.

ORDER: IT IS HEREBY ORDERED that the application for attorney fees is granted in the amount of $1,071.85.

January 27, 1989

/s/ Charles E. Auslander, Jr.
Charles E. Auslander, Jr.
Immigration Judge